BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHERETTA Y. MYERS	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,043,611
	)	
FOUR B CORPORATION d/b/a	)	
PRICE CHOPPER	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 17, 2009, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts following an August 13, 2009, preliminary hearing.[1] Leah B. Burkhead, of Mission, Kansas, appeared for claimant. Timothy G. Lutz, of Overland Park, Kansas, appeared for respondent.

In the Administrative Law Judge's (ALJ) prior Preliminary Decision dated April 9, 2009, she found that claimant had provided respondent with timely notice of her claimed injury. At that time, the ALJ also ordered an independent medical evaluation (IME) of claimant by Dr. Vito Carabetta to address the issue of causation. Dr. Carabetta's IME report was filed with the Division on June 9, 2009. In the ALJ's Preliminary Decision dated August 17, 2009, she ordered that Dr. Carabetta be claimant's authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 13, 2009, Preliminary Hearing and the exhibits, which includes the transcript of the March 2, 2009, deposition of Sheretta Myers, and the transcript of the April 9, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file, including the IME report of Dr. Vito Carabetta filed with the Division on

[1] Respondent's Application for Review by Workers Compensation Board filed August 28, 2009, bears docket Nos. 1,033,674 and 1,043,611. On August 31, 2009, respondent filed an Amended Application for Review by Workers Compensation Board which bears only Docket No. 1,033,674. This appears to be an error, as the ALJ's August 17, 2009, Preliminary Decision bears only Docket No. 1,043,611. There was no "August 17, 2009, Award" entered by Judge Roberts in Docket No. 1,033,674.

June 9, 2009. The record does not include the transcript of the regular hearing in Docket No. 1,033,674, which respondent attached to its brief to the Board.[2]

ISSUES

Respondent argues that claimant failed to prove she suffered personal injury by accident that arose out of and in the course of her employment. Further, respondent contends claimant failed to provide timely notice of her alleged injury.[3]

Claimant contends she suffered injuries because of her repetitive lifting at work, which culminated in a specific accident on December 11, 12, 13 or 14, 2008. Further, claimant asserts that she gave respondent timely notice of her injury.

The issues for the Board's review are:

(1) Did claimant sustain an accident or series of accidents that caused an injury that arose out of and in the course of her employment with respondent?

(2) If so, did claimant give respondent timely notice of her accidental injury?

FINDINGS OF FACT

Claimant has worked for respondent since October 2005. She first worked in the bakery department, where her job required her to repetitively use her hands. Claimant developed bilateral carpal tunnel syndrome. She filed a workers compensation claim, which was settled on December 11, 2008, in a running award. She was found to have a 14 percent impairment to her left upper extremity at the level of the forearm and a 14.5 percent impairment to her right upper extremity at the level of the forearm.

In May 2008, claimant was moved out of the job in the bakery and was given a job in the floral department. The job was offered by respondent because Mark Selders, respondent's store director, believed the job would have less repetitive motion for claimant's hands and wrists. Claimant accepted the transfer for the same reason. However, because the job in the floral department would not be a 40-hour per week job, claimant also worked in the produce department. She testified that she spent, on an

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[2] Respondent improperly refers to that regular hearing testimony in its brief to the Board under its "Summary of Evidence."

[3] In the ALJ's April 9, 2009, Preliminary Decision, she found that claimant had given respondent timely notice of her injury. Respondent appealed the April 9, 2009, Preliminary Decision, but its application for review did not list timely notice as an issue. The Board dismissed respondent's appeal as being interlocutory. Nevertheless, the Board's Order states that respondent "may reserve that issue for a future appeal . . ." *Myers v. Four B Corporation d/b/a Price Chopper*, No. 1,043,611, 2009 WL 1996487 (Kan. WCAB June 30, 2009).

average, about 80 percent of her time working in the floral department and 20 percent working in the produce department. The amount of time she worked in the floral department versus the produce department changed on a day-to-day basis.

Claimant's job in the floral department consisted of cleaning water buckets, cutting fresh flowers, watering, unloading flowers, and arranging flowers. She also pulled a flatbed cart to move flowers onto the sales floor. Boxes of flowers weighed from 2 to 5 pounds. In doing her job in the floral department, she was required to bend, squat, push and pull. She described the work in the floral department as semi-light.

When she worked in the produce department, she hung signs and price tags. She also rotated and stocked produce. She said she would pull a cart of produce from the back of the store to the sales floor. The boxes of produce would weigh from 8 pounds to 50 pounds apiece. She said at times she had to lift a box off the cart in order to unload the produce. She said the job in the produce department required her to perform repetitive heavy lifting.

Claimant testified that sometime between December 11 and December 14, 2008, she was setting produce out for display. As she was reaching and stretching to place the product on the display shelf, her left arm started hurting. She said she felt shooting pains from her neck to her shoulder blade. She said the pain was different from the pain she had previously felt, which had been the subject of her previous workers compensation claim. Previously her pain had begun in her hands and traveled up her arms to her elbows and shoulders. After the incident in December 2008, she said she had pain that began on the left side of her neck and traveled down to her shoulder, elbow and hand.

Claimant testified that she told both Robert Mrowinski, the produce department manager, and Mr. Selders, the store director, about her injury the day it happened.[4] She said when she spoke with Mr. Selders, she asked to be seen by the company doctor. After Mr. Selders checked with the home office, he told her that she would need to see her own doctor.

On her own, claimant went to the emergency room of St. Luke's Hospital on December 13, 2008, complaining of a chronic achy, sore left shoulder that was worse with movement. She indicated that when she turned her head, she felt a sharp, shooting pain in her left shoulder. In the history portion of the emergency room records, there is a notation that claimant said her left shoulder condition began a week earlier, although claimant testified she told them the pain started two to three days earlier, not a week. X-rays of the left shoulder showed no acute osseous injury. She was treated with ice and medication.

[4] Although she testified she told Mr. Selders the same day the accident occurred, she also testified that she did not tell Mr. Selders about her injury or ask for medical treatment until December 23, 2008.

Claimant said she was involved in a motor vehicle accident in April 2007. She had some resulting neck symptoms and shoulder discomfort, but those problems soon resolved. Also, claimant had been off work from November 30, 2008, through December 7, 2008, for an upper respiratory infection. During that period, on December 5, 2008, she saw her personal physician, Dr. Alexander Mallouk, for a follow-up visit for her illness. While there, claimant told him she had started having pain in the left side of her neck and her left shoulder girdle.

Mark Selders testified that on December 23, 2008, claimant, for the first time, asked if she could see the company doctor. She did not say that she had a condition she thought was work related but said she was having pain in her shoulder or neck area. She did not tell him or imply that her shoulder and neck problems were related to her work before that date, but she had earlier complained to him of assorted pains in connection with an illness.

Mr. Selders disagreed with claimant's claim that her job entailed heavy lifting. He said her job involved minimal lifting. The job in produce did involve some reaching, but he disagreed that working in produce required her to lift boxes, because the boxes could be slid.

Robert Mrowinski, the produce manager at respondent, testified that claimant never reported a work-related injury to him while he was her supervisor. He knew claimant had a lifting restriction from her earlier injuries and said the produce carts were loaded for her in a way that she would not have to physically take a box down to get to the product. He also said that if claimant needed help moving a full box because of her lifting restriction, she could ask any produce employee for help. He had told all his employees to help her if asked.

Mr. Mrowinski agreed with claimant that she spent about 80 percent of her time working in the floral department and 20 percent in the produce department. When working in the produce department, claimant primarily made signs, performed price verifications, and hung tags. She also set product out for display, and he said that task would involve some reaching.

After a preliminary hearing held on April 9, 2009, the ALJ ordered claimant to be evaluated by an independent medical examiner, Dr. Vito Carabetta to address the issue of whether claimant's work activities while stocking produce could have aggravated or accelerated her neck and left shoulder condition resulting in a need for medical treatment. Dr. Carabetta saw claimant on June 4, 2009. She told him her chief complaint was left shoulder pain that extended upward posteriorly in the shoulder girdle towards the base of the neck. In the history claimant gave Dr. Carabetta, she said that while handling a box, she felt a sudden popping sensation laterally at her left shoulder. After examining claimant, Dr. Carabetta diagnosed her with left rotator cuff tendinitis. Dr. Carabetta opined:

> In the case of this individual, matters are indeed rather straightforward from the medical perspective. She describes specific activities on December 14, 2008, and even recalls a sudden popping sensation at the left shoulder while carrying out her duties. This is not really a "series" sort of presentation, nor something related to overall cumulative trauma issues that affected the upper limbs previously. Rather, it appears that we are dealing with a rather specific event, and then some worsening thereafter. She presents with signs and symptoms compatible with left rotator cuff tendinitis. In this age bracket, it is all too common for many of us to develop problems such as this, as some downsloping of the acromial tip will occur quite commonly. This compromises the space for rotator cuff tendons, and when presented with the right instigating factor such as overhead activity or repetitive outward reaching, then this sort of problem can develop. The patient has described activities that really only involved overhead reaching for a box once every ninety minutes. This box would generally then be placed on the floor, and then produce would be placed just above waist level for display. Some of this, however, would require a considerable amount of outward reaching on a repetitive basis. Therefore, a causative factor, given the right circumstances, is indeed present. With one particular overhead reach for one of these boxes, she did recall a popping sensation laterally at the left shoulder. All the factors are present, and her presentation is indeed quite straightforward. Causation appears to be established, and appears to be rather specific.[5]

At the preliminary hearing held August 13, 2009, claimant was asked about her description of a popping sensation and the lack of any mention of that in the emergency room records of St. Luke's Hospital of December 13, 2008. Claimant testified that she told the emergency room personnel that she had been injured earlier that day and told them about the pain she was feeling, but she could not remember everything she said word for word.

PRINCIPLES OF LAW AND ANALYSIS

(1) Did claimant sustain an accident or series of accidents that caused an injury that arose out of and in the course of her employment with respondent?

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[5] IME report of Dr. Vito Carabetta, filed June 9, 2009, at 3-4.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

Claimant describes a series of cumulative traumas and microtraumas to her upper extremity, shoulder and neck as a result of her regular job duties with respondent through December 14, 2008. Although her history is somewhat inconsistent, Dr. Carabetta opines that claimant's job duties included tasks that would cause the injuries he diagnosed.

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[6] K.S.A. 2008 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

This Board Member is persuaded by claimant's testimony and the expert medical opinion testimony of Dr. Carabetta that claimant suffered personal injury by accidents that arose out of and in the course of her employment with respondent.

(2) Did claimant give respondent timely notice of her accidental injury?

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2008 Supp. 60-206(a) states:

> In computing any period of time prescribed or allowed by this chapter, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. "Legal holiday" includes any day designated as a holiday by the congress of the United States, or by the legislature of this state, or observed as a holiday by order of the supreme court. When an act is to be performed within any prescribed time under any law of this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply. [12]

[12] See *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

Whether claimant suffered a specific accident on or about December 13, 2008, or a series of accidents through December 14, 2008, she gave notice within 10 days. Respondent admits receiving notice on December 23, 2008. Excluding intervening Saturdays and Sundays, claimant gave notice seven days after her accident.

K.S.A. 2008 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

Paraphrasing the above statute, the date of accident for a series is the earliest of (1) the date the authorized physician took claimant off work or issues work restrictions, (2) the date claimant gave respondent written notice of injury, or (3) the date claimant is informed in writing that her condition is work related. In this case, none of these three events occurred before December 23, 2008, when respondent admits claimant gave her employer notice of her injury. Therefore, notice for the cumulative traumas was timely.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

CONCLUSION

(1) Claimant suffered personal injury by accidents that arose out of and in the course of her employment with respondent.

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[13] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2008 Supp. 44-555c(k).

(2) Claimant's gave respondent timely notice of her accidents.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Marcia L. Yates Roberts dated August 17, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2009.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Leah B. Burkhead, Attorney for Claimant
Timothy G. Lutz, Attorney for Self-Insured Respondent
Marcia L. Yates Roberts, Administrative Law Judge